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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES INGERSOLL, SR.,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 75A03-0603-CR-00138
)	
STATE OF INDIANA,)	
)	
Appellee.)	

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable David P. Matsey, Judge
Cause No. 75C01-0306-FA-6

April 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

In this belated appeal, Appellant-Defendant, James Ingersoll, Sr., appeals his conviction and sentence, following a jury trial, for Rape as a Class B felony¹ and Criminal Deviate Conduct as a Class B felony.² Upon appeal, Ingersoll challenges the sufficiency of the evidence to support his convictions.

We affirm.

The record reveals the following facts in the light most favorable to the State. The victim in this case, Betty Combs, was seventy-one years old at the time of the August 24, 2004 trial. She had an extensive history of health problems, including congestive heart failure, diabetes, strokes, vascular disease, osteoarthritis affecting her back, hips, and legs, and depression. Betty had been wheelchair-bound for approximately five years. In approximately July of 2002, Betty moved into Countryside Place Nursing Home due to these health problems and the fact that her husband was suffering from late-stage emphysema. Betty's husband passed away in November of 2002, causing her depressive condition to worsen. At the end of April 2003, Betty moved out of the nursing home and into a home at 6975 East Homette Avenue in Knoxville, which her daughter shared with her ex-husband, Ingersoll. Betty's daughter moved out of the house five to ten days later, but Betty and Ingersoll remained. At some subsequent point, Ingersoll's friend, Charlie Hall, and Hall's girlfriend, Deanne Jackson, moved into the house.

According to Betty, Ingersoll, who served as her primary caregiver, would make her engage in sexual acts with him. Betty testified that she had told Ingersoll, "No," and,

¹ Ind. Code § 35-42-4-1 (Burns Code Ed. Repl. 2004).

² Ind. Code § 35-42-4-2 (Burns Code Ed. Repl. 2004).

“It [isn’t] right.” Tr. at 31. In spite of this, according to Betty, Ingersoll would engage her in oral sex and intercourse. After engaging her in oral sex and intercourse, Ingersoll would clean Betty up and change her bed sheets. Betty testified that she did not want the oral sex and intercourse to occur, that she would have “slapped him” if she were big enough, but that she also feared having to go back to the nursing home. Tr. at 54. Betty testified that she did not report Ingersoll to her Home Healthcare aides because Ingersoll was always present when they were there, and she thought Ingersoll would kill her if she reported him. Betty’s testimony indicated an additional fear of Ingersoll on the basis that he had a gun and had threatened to kill his daughter and her boyfriend. At some point, according to Betty, Ingersoll found a job and left the house, whereupon she reported the unwanted sexual contact to Jackson, who called Betty’s social worker, Pat Heiden, who called law enforcement.

Jackson testified that when she moved into the home on Homette Avenue, Ingersoll was Betty’s primary caregiver but that she began taking care of Betty as well. According to Jackson, Ingersoll was always sitting at the kitchen table when Home Healthcare workers would come to the home. At some point on approximately June 5, Betty, whom Jackson described as “scared,” made “serious accusations,” causing Jackson to call Home Healthcare. Tr. at 129-30.

In response to Jackson’s call, Home Healthcare social worker Heiden testified to visiting Betty, who was in tears, in her home on the afternoon of June 5. Sergeant Kelly Fisher of the Starke County Sheriff’s Department also responded to the scene and observed Betty in her wheelchair, with her head dropped and her face red from apparent

crying. Heiden, Sergeant Fisher, Betty and Jackson all decided that Betty would remain at her home. Sergeant Fisher then attempted to find Ingersoll, which she was unable to do.

Jackson testified that Ingersoll came home the evening of June 5. That evening Jackson got Betty ready for bed, and then she and Hall left the home, leaving Betty alone with Ingersoll, until they returned around 12:30 or 1:00 a.m. the morning of June 6.

With respect to one particular occasion,³ Betty testified that Ingersoll, upon putting her to bed, made her have oral sex with him by repeatedly turning her head, putting his penis in her mouth, and making her swallow. Betty testified that this made her vomit. According to Betty, Ingersoll then made her engage in sexual intercourse by removing her underwear, placing them at the foot of the bed and then positioning himself behind her as she lay on her bed and placing his penis into her vagina. Betty testified that Ingersoll did not say anything while this was occurring, and that when he had finished, he got up and put a clean nightgown on her, changed the bed sheets and put her to bed. Betty testified that she reported the incidents to Jackson and Hall when they came home early the next morning.

When Jackson arrived home the morning of June 6 and checked on Betty, she noticed that a sheet was hanging “way off” the bed. Tr. at 136. Jackson testified that these sheets were different than the ones she had put on Betty’s bed. Jackson further testified that Betty was wearing a different nightgown and that she was upset, scared,

³ The dates on which any of the acts occurred are difficult to discern with specificity from Betty’s testimony, but her testimony regarding this particular incident indicates it occurred the night before she was taken to the hospital, which would be June 5, 2003, the date listed in the charging information.

crying and shaking. Jackson responded by calling the police and an ambulance. Jackson further testified that the clothing she had put Betty to bed in and the sheets and pillowcases formerly on her bed were in the washing machine, and that there was a towel on the bathtub with vomit on it.

Registered Nurse Elaine Gouwens testified that Betty arrived in the Starke Memorial Hospital emergency room at 3:45 a.m. on June 6, 2003 complaining of sexual assault. At that time, Betty was withdrawn, anxious and fearful. Upon examining Betty, Gouwens observed bruising to her tongue and on the roof of her mouth, which she testified was consistent with Betty's account of oral penetration. Gouwens testified that a physician then collected specimens for a rape kit. The vaginal wash, vaginal cervical swabs, and external genital swabs matched the DNA profile of Ingersoll.

Upon examining the Homette Avenue home, Starke County Sheriff's Department Deputy Oscar Cowen observed women's panties at the end of Betty's bed, and, among other things, bed sheets and a towel containing vomit inside the washing machine.

Detective Ron Lawson of the Starke County Police interviewed Ingersoll, who claimed that he had had consensual sex with Betty one time in early June of 2003. According to Ingersoll, he was cleaning Betty of a mess she had made "all over herself" when "she started playing with [him]," and "feeling [his] privates." Tr. at 291. Ingersoll further testified that Betty then tried to put his penis in her mouth and to bite him, which he would not allow, so the two had sexual intercourse.

Ingersoll testified at trial that he and Betty had engaged in sexual intercourse, but contended it was consensual. According to Ingersoll, their sexual encounters began after

Betty's daughter left the home and occurred pursuant to Betty's initiative rather than his, when he was lifting Betty off of the "potty chair" and she "grab[bed]" him. Tr. at 342. Ingersoll further contended that on the date in question, June 5, after Betty had vomited her dinner and he had cleaned her up, she threatened not to pay the rent if he would not have sex with her. Ingersoll denied ever engaging in oral sex with Betty but conceded that he had "lied" in previously telling Detective Lawson he had had sex with Betty only one time. Tr. at 356.

Ingersoll was charged on June 6, 2003 with rape as a Class A felony and criminal deviate conduct as a Class B felony. The case proceeded to trial on August 24-27, 2004. At the close of the State's case-in-chief, the trial court granted Ingersoll's motion for a directed verdict on the charge of rape as a Class A felony and directed that the rape charge proceed as a Class B felony. On August 27, 2004, the jury returned verdicts of guilt on both the rape and criminal deviate conduct counts. The trial court sentenced Ingersoll on September 17, 2004 to twenty years on each count, to be served concurrently. Ingersoll filed his notice of appeal on October 6, 2004. On October 14, 2004, the trial court entered an order refusing to appoint pauper counsel for defendant to appeal. On October 21, 2004, defense counsel filed a motion to withdraw appearance, which the trial court granted. On November 9, 2005, Ingersoll filed a petition for appointment of local counsel to pursue proceedings under Indiana Post-Conviction Rule 2, which the trial court granted on November 28, 2005.⁴ Ingersoll, through counsel, then

⁴ Ingersoll filed multiple petitions and correspondences with the court prior to this November 9 petition.

filed a petition to file a belated notice of appeal on December 6, 2005, which the trial court also granted. Ingersoll filed his belated notice of appeal on December 21, 2005.⁵

Upon appeal, Ingersoll challenges the sufficiency of the evidence to support his convictions. In making this claim, Ingersoll does not contest the fact of the sexual contact but argues the State produced insufficient evidence demonstrating the force necessary to establish either rape or criminal deviate conduct.

Our standard of review for a sufficiency-of-the-evidence claim is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id. It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. Jones v. State, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

A person may be convicted of rape as a Class B felony if the State proves beyond a reasonable doubt that the defendant knowingly or intentionally has sexual intercourse with a member of the opposite sex when the victim is compelled by force or imminent

⁵ On August 31, 2006, in response to an order by our court to show cause why this appeal should not be dismissed, appellant's counsel indicated there had been confusion surrounding the Notice of Completion of Clerk's Record. Our court approved counsel's response, and this appeal followed.

threat of force. See I.C. § 35-42-4-1. A person may be convicted of criminal deviate conduct as a Class B felony if the State proves beyond a reasonable doubt that the defendant knowingly or intentionally causes another person to perform or submit to deviate sexual conduct⁶ when the other person is compelled by force or imminent threat of force. See I.C. § 35-42-4-2.

The element of force to sustain a rape conviction may be inferred from the circumstances. Tobias v. State, 666 N.E.2d 68, 70 (Ind. 1996); Jones v. State, 589 N.E.2d 241, 242-43 (Ind. 1992). It is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined. Smith v. State, 678 N.E.2d 1152, 1155 (Ind. Ct. App. 1997), trans. denied. This is a subjective test which looks to the victim's perception of the circumstances surrounding the incident. Id. The issue is therefore whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance. Id. "Although lack of consent is not an element of rape or criminal deviate conduct per se, evidence which has a tendency to prove either consent or lack of consent is relevant to the element of compulsion, which exists in both offenses." Tyson v. State, 619 N.E.2d 276, 293 n.19 (Ind. Ct. App. 1993), trans. denied, cert. denied, 510 U.S. 1176 (1994). "[E]vidence that the alleged victim did not consent may be evidence that the victim was compelled." Id.

We reject Ingersoll's contention that the circumstances of this case do not demonstrate the force necessary to establish rape and criminal deviate conduct. The

⁶ "Deviate sexual conduct" is defined, in pertinent part, as an act involving a sex organ of one person and the mouth or anus of another person. See Ind. Code § 35-41-1-9 (Burns Code Ed. Repl. 2004).

testimony established that Betty was elderly, infirm, immobile, depressed, and afraid of her live-in “caretaker” Ingersoll, that she verbally rejected Ingersoll’s sexual advances and that she would have done so physically if she were able.⁷ The testimony further established that Betty had reported Ingersoll’s unwanted sexual advances and the authorities were looking for him on June 5, 2003, the day when the charged acts occurred. That evening, Ingersoll returned to the house where he and Betty were alone and had Betty perform oral sex on him by repeatedly turning her head in the direction of his penis and placing his penis in her mouth, which caused her to vomit. He then positioned himself behind her as she lay, physically incapacitated, on her bed while he removed her underwear and performed intercourse. Ingersoll’s manipulation of Betty’s head and body for purposes of oral sex and intercourse, in light of the circumstances including her reports of the unwanted sexual contact, her voiced objections, her fear of him, her physical inability to defend herself, her state of depression, and her overall vulnerability support the jury’s conclusion that Betty felt forcibly compelled by Ingersoll to comply with his acts. See D.B. v. State, 842 N.E.2d 399, 402 (Ind. Ct. App. 2006) (finding sufficient evidence defendant was compelling compliance of victim where evidence indicated defendant was sitting on victim, was much bigger than she was, and the victim feared him). While not necessary to a finding of sufficient evidence, we also note that Ingersoll’s admitted credibility problem further supports the jury’s verdict.

⁷ The facts of this case showing Betty in fear of Ingersoll, in a highly vulnerable state, and having voiced objections to Ingersoll’s advances multiple times, are easily distinguishable from those in Smith v. State, 678 N.E.2d 1152, 1155 (Ind. Ct. App. 1997), trans. denied. In that case, although the victim did not consent to being fondled, there was no showing that the victim feared the perpetrator or otherwise submitted out of forced compulsion to cooperate with the perpetrator. Id.

Having determined that there was sufficient evidence of force, we reject Ingersoll's challenge to the sufficiency of the evidence to support his convictions for rape and criminal deviate conduct.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.